No. 12410

United States
Court of Appeals
For the Ninth Circuit

L. F. CORRIGAN, and CLARA R. CORRIGAN, who sue on behalf of General Insurance Company of America, a corporation,

Appellants,

vs.

SAN MARCOS HOTEL COMPANY, a corporation,

Appellee.

Brief of Appellee

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SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES CITED

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Brief of Appellee

In this brief the parties will be referred to by their designations in the District Court, viz: Appellants as plaintiffs and Appellee as defendant, or by name. References to the printed transcript of record will be indicated by the abbreviation "Tr." followed by numerals denoting the page numbers.

Statement of the Case

Plaintiffs set forth the facts they assert are established by the record in separate paragraphs on pages 2 to 6, inclusive, of Appellants' Opening Brief. Except for defendant's position concerning the admissibility

at the trial of the depositions of plaintiffs Corrigan, which position is hereinafter stated and argued, defendant differs with plaintiffs' statement of the case only in the following instances:

(1) Defendant in its answer (Tr. 6) and at the trial denied that plaintiffs ever, at any time material to this action, placed or left a coat under the care of defendant, and in its finding of fact number 4 the trial court found as a fact that Mrs. Corrigan had a mink coat which she retained in her personal and exclusive custody and control. (Tr. 19, 49, 50, 66) Defendant also maintained successfully that if a coat was lost by or stolen from Mrs. Corrigan this was occasioned by her negligence. (Tr. 6, 21, 22) The trial court found this to be a fact. (Tr. 21)

(2) There is only *one* coat rack in the "powder room" referred to in paragraph (c) on page 3 of Appellants' Opening Brief, and on this rack are individual coat hangers. This coat rack is approximately eighty-four inches long. (Tr. 37, 46)

(3) Contrary to the statement in paragraph (d) on page 3 of Appellants' Opening Brief that defendant knew of Mrs. Corrigan's custom of leaving her coat in the powder room while eating, it appears, and the court found, that Mrs. Corrigan had never informed defendant that she was in the habit of leaving her coat in the powder room, nor did she inform defendant the night of February 15, 1948 that her coat was in the powder room. (Tr. 20, 49, 54)

(4) Paragraph (f) on page 4 of Appellants' Opening Brief is inaccurate insofar as it is stated that it was the *general* custom to leave coats in the powder room, since the record indicates that such was the custom only of *some* or a *few* of the guests. (Tr. 37, 96, 97)

(5) Defendant does not concede that, as stated in paragraph (i) on page 5 of Appellants' Opening Brief, and as testified by Mrs. Corrigan (Tr. 58), there were approximately two hundred coats hanging on the eighty-four inch coat rack in the powder room on the night in question. The trial court did not so find, and the testimony is patently unreasonable.

(6) Defendant does not concur in the criticism of the trial judge interjected by appellants into paragraph (m) on page 5 of their opening brief.

(7) Mrs. Corrigan did not return to the powder room between the hours of 7:15 o'clock and 10:15 o'clock on the evening in question, nor did she check as to the safety or whereabouts of her coat during those hours. (Tr. 20-21) This is not mentioned by plaintiffs.

(8) The trial judge found as facts that Mrs. Corrigan was negligent in caring for her coat, and that her loss would not have occurred without her negligence. (Tr. 21)

If the trial court's finding of negligence is upheld, *or* if his finding that the coat was not lost or stolen while under the care of defendant is upheld, then, and in either event, the judgment of the district court must be affirmed.

Plaintiffs have designated as the only point on which they intend to rely their assertion that the evidence does not support the finding that Mrs. Corrigan was negligent so as to excuse defendant from liability under Section 62-304, Arizona Code Annotated, 1939. (Tr. 109) However, in their specifications of error number 1 plaintiffs now attack the finding that Mrs. Corrigan

had and retained her coat in her personal and exclusive custody and control.

The issue presented by the appeal, then, is twofold: Are these two findings so clearly erronous that they must be set aside? If there is evidence to reasonably support either of these findings the appeal must fail.

Argument Concerning Use of Depositions

At the trial defendant objected to the use of the depositions of Mr. and Mrs. Corrigan upon the grounds that such use was not permissible under the provisions of Rule 26 (d) of the Federal Rules of Civil Procedure (28 U.S.C.A. following section 723). Defendant stipulated that the depositions might be taken (Tr. 42, 43), but specifically notified plaintiffs that the right to object to the depositions at the trial was reserved (Tr. 44), and plaintiffs could in no way have been misled by the fact that defendant consented to the taking of the depositions.

In order for use of the depositions to have been permissible at the trial of this action it must have appeared that one of the provisions referred to in Rule 26 (d) (3) of the Federal Rules of Civil Procedure had been complied with. Rule 26 (d) (3) is as follows:

"Rule 26. *Depositions Pending Action.*

* * *

"(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had

due notice thereof, in accordance with any one of the following provisions:

* * *

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, *unless it appears that the absence of the witness was procured by the party offering the deposition*; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. * * *" (emphasis added)

Obviously, there could be no basis for a finding by the court that any of the foregoing conditions existed, and the court did not so find. All that does appear affirmatively is that Mr. and Mrs. Corrigan had reservations at the San Marcos Hotel until Tuesday, March 1, 1949, the date of the trial (Tr. 92, 93); that their depositions were taken on the preceding Wednesday, February 23, 1949, (Tr. 43) and that they left the hotel, presumably for Dallas, on the intervening Sunday, February 27, 1949, two days before the trial, for reasons not yet disclosed. (Tr. 39) Clearly, they procured their own absence.

In argument against the objection plaintiffs stated that defendant had had opportunity to cross-examine and would not be hurt by use of the depositions. This

observation is of no consequence for several reasons: (1) Defendant carefully reserved the right to object to the use of the depositions at the trial. (2) The depositions could be used only if Rule 26 (d) (3), supra, so permitted, and this it did not and does not do. (3) Consent to and appearance at a deposition for purposes of discovery in accordance with present practice is quite a different thing from consenting to the use of depositions at a trial in lieu of actual testimony. (4) Defendant was entitled, in the absence of extraordinary circumstances, to have the trier of facts observe Mr. and Mrs. Corrigan and their mannerisms and manner of testifying. (5) A detailed investigation and inquiry by defendant was called for by the peculiar circumstances, among which is the fact that it was through Mr. Corrigan's office that the coat was insured with plaintiff insurance company and the loss was paid (Tr. 70, 74), and this appeared from documents exhibited to defendant's counsel (Tr. 79).

The trial court admitted the depositions "subject to the objection". (Tr. 42) Since the trial was to the court sitting without a jury the court could properly reserve its final ruling on defendant's objection. Defendant submits that the court would have been wholly justified in refusing to consider the depositions in its deliberation, and that the depositions should not be considered on this appeal.

Having stated its position with regard to the use of the depositions, defendant, without waiving this point, will meet and refute the arguments advanced by plaintiffs in their opening brief, and only for such purpose will refer to the depositions of Mr. and Mrs. Corrigan. It is defendant's contention that the judgment

of the District Court must be affirmed whether or not the Corrigan depositions are considered.

Comment on Appellants' Specifications of Errors

Analysis discloses that plaintiffs' specifications of errors, appearing on pages 7 to 11 of their opening brief, actually, with a single exception, are specifications of the points at which plaintiffs differ with the trial court in its determination of questions of fact. The exception is specification number 9 on page 10 of plaintiff's opening brief, to the effect that the District Court erred in refusing to conclude, as a matter of law, that this action is controlled by Section 62-304, Arizona Code Annotated, 1939. Defendant concedes that this statute is controlling, and defendant represents that the District Court correctly applied the statute in determining the case and that the only alleged errors plaintiffs can assert are their differences with the District Court's determination of the facts to which the statute was applied. Plaintiffs so indicate in their Summary of Argument and in their Statement of Points to be relied on. (Tr. 109)

Summary of Argument

The argument on behalf of defendant and appellee will be presented under the following sub-headings:

I. *Weight of Findings by Trial Court.*

(a) In cases tried upon the facts by the District Court without a jury the findings of fact by the trial judge are to be accepted on appeal, and if there is any testimony consistent with a finding it must be treated as unassailable, unless clearly erroneous.

(b) Negligence is a question to be determined by the

trier of the facts, that is to say, by the jury if there be a jury or by the trial judge if there is no jury.

(c) The primary function of the trial court is to find the facts by weighing the evidence and choosing from among conflicting factual inferences and conclusions those which it deems most reasonable, and this function will be respected on appeal.

II. *Answer to Appellants' Arguments.*

(a) Answer to Appellants' Arguments Concerning Negligence.

(b) Answer to Remainder of Appellants' Argument.

III. *Conclusion.*

ARGUMENT

I. *Weight of Findings by Trial Court.*

(a) *In cases tried upon the facts by the District Court without a jury the findings of fact by the trial judge are to be accepted on appeal, and if there is any testimony consistent with a finding it must be treated as unassailable, unless clearly erroneous.*

The foregoing proposition is axiomatic and is embodied in Rule 52 (a) of the Federal Rules of Civil Procedure (28 U.S.C.A. following section 723c). The proposition repeatedly has been reaffirmed and reasserted by this Court, which stated, in *Wittmayer et ux. v. United States,* 9th Cir., 118 F. 2d 808, 811:

> "The findings of the trial court fall within the familiar rule, that where based on conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. * * *

"The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52 (a), 28 U.S.C.A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. * * *

"As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 S.Ct. 169, 170, * * * the case is pre-eminently one for the application of the practical rule, that *so far * * * 'as there is any testimony consistent with the finding, it must be treated as unassailable.'*" (emphasis added)

(b) *Negligence is a question to be determined by the trier of the facts, that is to say, by the jury if there be a jury or by the trial judge if there is no jury.*

Negligence is indisputably a question of fact. If there be a jury it ordinarily is determined by the jury in accordance with instructions. If there is no jury the trial judge is of course the trier of facts, including negligence. In a sense negligence is an ultimate fact, or a conclusion of fact, determined by inferences from other facts. In *City of San Diego v. Perry et al.,* 9th Cir., 124 F. 2d 629, the trial court, sitting without a jury, found negligence by inference from undisputed facts. On appeal, since the inference was a reasonable one and not clearly wrong, this finding was upheld although a contrary finding also might have been considered reasonable.

(c) *The primary function of the trial court is to find the facts by weighing the evidence and choosing from among conflicting factual inferences and conclusions those which it deems most reasonable, and this function will be respected on appeal.*

This proposition is well stated in *Springman v. Gary State Bank,* 7th Cir., 124 F. 2d 678, 681:

"* * * The credibility of the witnesses, *the inferences to be drawn from the testimony,* and the weight to be given the evidence are purely questions of fact. We are not the triers of fact, but merely reviewers of the action of the trial court and in our investigation we are limited to an ascertainment of the existence of substantial evidence sufficient to support the findings and where there is any competent evidence to sustain the trial court's findings, they cannot be disturbed on appeal unless we can say they are clearly erroneous." (emphasis added)

And it is also stated in the following language in *Grip Nut Co. v. Sharp,* 7th Cir., 150 F. 2d 192, 196:

"It is to be remembered that the trial court has the primary function of finding the facts, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it deems most reasonable."

With the foregoing propositions in mind we must proceed to examine the evidence to determine whether the findings by the District Court that Mrs. Corrigan had and retained her coat in her personal and exclusive custody and control (Tr. 19), and that she did not use ordinary or reasonable care in the safekeeping of her coat and the proximate cause of its loss was her negligence (Tr. 21), are so clearly erroneous that they can be set aside.

First, as to her retention of exclusive custody and control of the coat, it has been observed that unless the coat was placed or left by Mrs. Corrigan under the care of defendant, plaintiffs cannot recover.

The applicable Arizona statute is as follows:

"62-304. Liability of innkeeper to guest.—An innkeeper is liable for all losses of, or injuries to, per-

sonal property *placed or left by his guests under his care, unless occasioned* by an irresistible, superhuman cause, by a public enemy, *by the negligence of the owner,* or by the act of some one brought into the inn by the guest. If the innkeeper keeps a fireproof safe, and gives notice to the guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe and will not be liable for money, jewelry, documents or other articles of unusual value and of small compass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or any injury to such articles if not deposited with him and not required by the guest for present use." (emphasis added)

Mrs. Corrigan's own testimony reveals her intentions and understanding with respect to the custody, control and care of her coat, even though the testimony is somewhat lacking in directness. It is:

"Q Did you ordinarily keep this coat in your accommodation, in the dressing room or bedroom?

A Yes.

Q Had you ever turned it over to any employee or representative of the hotel?

A Never.

Q Did you at all times keep the coat in your own exclusive custody?

A Yes. Other than when I would take it to the —would leave it in the cloak-room or the ladies' room.

Q The coat in other words was always under your direct personal and exclusive control?

A Yes.

Q And did you ever leave in other places in the hotel besides in the—

A No.

Q Powder room?

A No. Other than in my own room. Often times I wore it into the lounge but it would be around my shoulders. I never left it.

Q Did you ever take it off in the lounge?

A I imagine I did, but I never left it.

Q Did anybody at the hotel, any representative of the hotel ever attempt to tell you what you should do with your coat.

A Well, no, not that I can remember.

Q You did then just as you pleased with it?

A Well, it was a custom—we have been going there many years. It was a custom; that was the place the ladies left their coats.

Q I understand. You did with your coat whatever you pleased. Whatever you yourself decided to do with the coat you did without any direction from any person at the hotel, is that right?

A I am not sure that I understand your question.

Q Your coat was worn or placed somewhere at your own discretion however you saw fit to wear it or wherever you saw fit to leave it was what was done with the coat at all times?

A I wouldn't say wherever I saw fit to leave it. I would say that I left it in the customary place.

Q If you had wanted to leave it on a chair in the lounge, you would have done that?

A That would have been my privilege, yes.

Q In other words, the coat was yours to do with and you did do as you saw fit?

A Sure. (Tr. 49-50)

* * * *

"Q Where did you store your luggage while you were a guest at the hotel?

A In my cottage.

Q You kept it in your cottage?

A Yes.

Q Did you ever check any articles with the hotel?

A No.

Q You at all times kept them in your room or wherever you were?

A Yes. (Tr. 52)

* * * *

"Q Did you have other coats of comparable value?

A No, I didn't have another coat with me as valuable as that one, or half as valuable. I had several coats with me.

Q Did you keep all of your jewelry in your room there at the hotel?

A Yes.

Q You never did deposit that with the management?

A No.

Q There is a vault there available for deposit of valuable articles, is there not?

A That I don't know because I have never—

Q You have never read a notice to the effect—

A Never asked the question.

Q Have you ever read a notice at the hotel to the effect that they keep a safe deposit box?

A Yes, I believe I have read that. I wouldn't swear to that because I don't remember.

Q That is your present recollection. You have some recollection of having read a notice?

A Some recollection there is a notice there.

Q You never did deposit any of your articles with the hotel?

A No, I lock them in my own room.

Q It being your intention or feeling you could look after your property just as well as the hotel?

A Well, I don't know that I ever analyzed it.

Q You just felt that you would rather have them with you?

A I just kept them is all. (Tr. 63-64)

* * * *

"Q You have been spending your winters at the San Marcos for several years?

A Yes, seven to be exact.

Q Seven?

A Yes. This is the seventh—

Q This year is the seventh trip there?

A Yes.

Q And during that time you have never given any jewelry or clothing, luggage into the direct custody of the hotel?

A Not that I recall.

Q How did you—

A I may have in the first years, but I don't recall it." (Tr. 66)

It appears that in her own mind Mrs. Corrigan believed that she retained personal custody and control of all of her effects, and her actions so indicate. The

question can be determined only by ascertaining Mrs. Corrigan's intentions. *Vance v. Throckmorton,* (Ky.) 5 Bush, 41, 96 Am. Dec. 327. The reasonable conclusion appears to be that the trial court's finding is correct. Certainly the trial court's finding is supported by substantial evidence.

II. *Answer to Appellants' Arguments.*

The bulk of Appellants' Opening Brief is devoted to argument for their contention that Mrs. Corrigan was not negligent, and defendant, in the interest of brevity, will combine its answer on the question of negligence with the application of the principles stated in the foregoing argument concerning the weight of findings by the trial court.

Appellants concede, of course, that negligence on the part of Mrs. Corrigan which proximately contributed to her loss, and without which the loss would not have occurred, is a defense to their claim. It remains only to determine whether the trial court's findings in this respect were so clearly erroneous that they must be set aside.

(a) *Answer to Appellants' Arguments Concerning Negligence.*

Defendant has no quarrel with plaintiffs' general definitions of negligence, which are stated under the first two subheadings in plaintiffs' argument. Defendant concedes and asserts that the test of the reasonably prudent person must be applied in the light of *all* of the surrounding circumstances, and that negligence is relative to *all* of the surrounding circumstances. Defendant does differ with plaintiffs as to the application of these principles.

First, it must be pointed out that *none* of the cases cited by plaintiffs on the question of negligence is in point.

Landrum v. Harvey, 28 N.M. 243, 210 Pac. 104, concerned a situation where the guest placed her rings in the pillow slip *in her room* and was personally present when a maid was changing the linen and removing it, and where the linen was taken by *hotel employees* and sorted, the rings disappearing somewhere along the line. The lower court directed a verdict for the hotel, but the appellate court held that the guest's carelessness could not *conclusively* be called negligence and that the issue of negligence should have been submitted to the jury.

Plaintiffs also cite *Smith v. Wilson,* 36 Minn. 334, 31 N.W. 176, in which it appears that the guest was robbed, while *sleeping in his room* behind a door which was bolted but could be opened with a wire from the outside, of money which was in a money belt fastened around his waist. The jury in the trial court had found that this was not negligence, and the appellate court held that it was not necessarily negligence *as a matter of law* and allowed the jury's verdict to stand.

In *Cunningham v. Bucky,* 42 W. Va. 671, 26 S.E. 442, also cited by plaintiffs, it appears indisputably that the guest was robbed *in his room,* while sleeping, *by one of the innkeeper's servants,* and the court held that the innkeeper was a guarantor of his servants' honesty.

In *Watson v. Loughran,* 112 Ga. 837, 38 S.E. 82, from which plaintiffs also quote, the facts were that the guest's jewelry was stolen from an unlocked trunk *in her room,* which was also unlocked, that two of the hotel's maids saw the guest leave the door open, and

that the maids had passkeys and could have locked the door, but failed to do so. The court held that the hotel, through its employees, was grossly negligent in not locking the room, the inference being that if the maids had not seen the guest's neglect the result might have been different.

In every one of the above cases the property disappeared from the guest's room.

Plaintiffs at another point in their opening brief cite, upon the question of custom, the case of *Swanner v. Conner Hotel Company,* Mo. App., 224 S.W. 123. There the guest, formerly a cab driver with a stand at the hotel, had seen employees of the hotel set the bags of guests while the guests were registering at the bellboys' station, and this was the general custom *of the hotel,* which the guest had observed while a cab driver and while a guest. On the occasion in question he followed the *hotel's* custom and set his bag near the bellboys' bench without notifying the hotel he had done so. When he returned for the bag many hours later it was gone. The defendant hotel, at the close of plaintiff's case, *demurred to this evidence,* which action required that the evidence be construed as strongly as possible in favor of the guest, and judgment was entered for the guest. The majority of the appellate court affirmed the judgment, saying, "We do not think that plaintiff's negligence was any more than a question for the trier of the facts" (224 S.W. 123, 124). However, there was a very strong dissent.

The situation presented by this appeal is entirely different from any of the foregoing: Mrs. Corrigan's coat was known by her to be worth $8,000.00 to $10,000.00, an obviously unusually high value for a coat. (Tr. 47) She left this coat in the powder room at the

San Marcos Hotel at or about 7:15 o'clock in the evening (Tr. 19, 45) and did not concern herself with its safety until 10:15 or 10:30 o'clock. (Tr. 20-21, 62) She told no one at the hotel she had left her coat there. (Tr. 20, 54) After eating dinner she went directly to the hotel lobby and remained there until she went for her coat around 10:30 o'clock. (Tr. 20, 55) From where she sat in the lobby Mrs. Corrigan could not see the powder room. (Tr. 55-56) She knew the powder room was unattended (Tr. 19-20, 51); she had seen the hotel's sign indicating that the powder room was not a proper place to leave articles. (Tr. 19, 51-52, 93-94); she knew there were many strangers and outsiders frequenting the hotel that night (Tr. 20-21, 61), but she took no notice of coats worn out of the hotel (Tr. 21, 58); she knew that there were several means of access to the powder room (Tr. 20, 56-57); she knew that the hotel would take care of the coat for her if she delivered it to a hotel employee (Tr. 21, 63, 66); and Mrs. Corrigan had been verbally warned about leaving property in the powder room (Tr. 20, 101). Mrs. Corrigan had never been told by any employee of the hotel to leave wraps in the powder room (Tr. 49), and it was *not* the general custom of all of the guests to do so (Tr. 96-97).

Defendant agrees with the trial court's finding of fact that Mrs. Corrigan did not, in view of all of the circumstances, act with respect to her coat as a reasonable and prudent person, guided by those considerations which usually regulate the conduct of human affairs, would have acted. Certainly, this finding is supported by the evidence, and is not clearly erroneous.

The question of an innkeeper's liability in earlier days was frequently before the courts, which then applied a strict common law doctrine not wholly in keep-

ing with present conditions. However, even in these old cases, where the strict common law doctrine was imposed on the innkeeper, negligence such as Mrs. Corrigan's was a complete defense.

An early case from Ohio is particularly appropriate and contains a well-written and logical discussion, and it is believed it will be helpful to the court to quote from this opinion, *Fuller v. Coates et al.,* 18 Ohio State Reports 343. The facts, briefly, were that: the guest hung his coat on a hook on the wall leading to the dining room, where he ate breakfast, and upon his return the coat was missing; the guest told no one he had hung his coat there; the hotel claimed to have posted notices that it would not be responsible for articles not left in the office, but the guest claimed not to have seen the notices; the hotel had a place to keep articles in the office. The case was tried to a jury which found for the defendant, and the trial court's instructions are of interest here. We quote as follows from *Fuller v. Coates et al.,* supra, beginning at page 345 of 18 Ohio State Reports:

"* * *

The court charged the jury as follows:

'1. An innkeeper is liable as an insurer of the goods of his guest committed to his care, against everything but the act of God or the public enemy, or the fraud or neglect of the guest himself, or his own servants or his traveling companion. The innkeeper is liable for a loss occasioned by his own servants, by his other guests, by robbery or burglary, or by rioters or mobs.

" 'As it is not claimed that an act of God, the public enemy, the traveling companion or servant of the guest, occasioned the loss in this case, the only question for your consideration is, whether the plain-

tiff's own negligence caused, or directly contributed to, the loss of the property.'

" '2. In legal contemplation, the property of a guest within the rooms of a public hotel, is in the possession and under the control of the landlord or proprietor, in such a sense as to place it in his care, and subject him to responsibility for its loss, unless the guest, or his servant, or agent, or traveling companion, has it in his own personal and exclusive keeping and care.'

" '3. If the coat was not left in the care or custody of the landlord, or his agents and servants, but was in the sole and exclusive keeping and custody of the plaintiff, at the time of the loss, the defendants are not liable for its loss, it not being claimed that it was taken from the plaintiff's room.' * * *

" '7. If the coat was taken into the plaintiff's own personal custody, and put or kept by him in a place not designated by the defendants, or their servants, and not kept for such purposes, and the attention of the defendants, one or any of their servants, was not called to it; and it was an unusual and manifestly hazardous and improper place to lay or hang such an article, and it was thereby lost, the defendants are not liable for such loss.'

" '8. If you find from the evidence that the coat was lost by reason of the negligence of the plaintiff to exercise ordinary care for its safety, it is admitted by the counsel that the defendants are not responsible for its loss. But the duty of determining what would constitute ordinary care in the premises, is to be determined by you in view of all the facts and circumstances of the case. You may take into consideration the throng of comers and goers, or the sparseness of population in the vicinity of the hotel, and taking also into consideration that the guest has a right, at all times, to presume that the innkeeper is exercising such care

of the baggage of his guest as the law requires him to exercise.' * * *

"By a statute of this State, the common law responsibility of innkeepers, as to all goods therein enumerated, is materially modified. The goods sued for in this case are not mentioned in the act; it has, therefore, no application to the case, further than the reason of the legislative policy on which it is based may be regarded in deciding between conflicting constructions of the rules of the common law, by which this case must be determined.

"It is claimed that the common law makes an innkeeper an insurer of the goods of his guest, as it does a common carrier of goods, against all loss, except that occasioned by act of God or the public enemy.

"The rules of the law controlling both these classes of liability have their foundation in considerations of public utility; but it does not therefore follow that the rule in every case is precisely the same. It would seem rather, that, where the circumstances of the two classes differ, public utility might reasonably require a corresponding modification of the rules applicable to the case.

"Common carriers ordinarily have the entire custody and control of the goods entrusted to them, with every opportunity for undiscoverable negligence and fraud; and are, therefore, held to the most rigid rules of liability. Innkeepers may have no such custody of the goods of their guests. In many instances, their custody of the goods is mixed with that of the guest. In such cases, it would be but reasonable that the guest, on his part, should not be negligent of the care of his goods, if he would hold another responsible for them. The case of a carrier and that of an innkeeper are analogous; but, to make them alike, the goods of the guest must be surrendered to the actual custody of

the innkeeper; then the rule would, undoubtedly, be the same in both cases.

"We are not, however, disposed to relax the rules of liability applicable to innkeepers, nor to declare that they are different from those applying to carriers, further than a difference of circumstances between innkeeper and guest may reasonably necessitate some care on the part of the latter.

"The charge of the court below is not inconsistent with a recognition of the same extent of liability in both classes of cases; for it is well settled that an action against a carrier cannot be maintained where the plaintiff's negligence caused, or directly contributed to, the loss or injury. Upon this theory, and assuming to the fullest extent the prima facie liability of the innkeeper, by reason of the loss, the court said to the jury: 'The only question for your consideration is, whether the plaintiff's own negligence caused, or directly contributed to, the loss of the property.'

* * *

"The essential question, then, between the parties is, what, on the part of the guest, is ordinary care, or what may be attributed to him as negligence.

"It is claimed that the court erred in relation to this point, in two particulars: 1. In holding that the guest might be chargeable with negligence, in the care of his goods, in any case where they were not actually upon his person; 2. In holding that the innkeeper could, in any manner, limit his liability for the loss of the goods of his guest, except by contract with him.

"If the guest takes his goods into his own personal and exclusive control, and they are lost, while so held by him, through his own neglect, it would not be reasonable or just to hold another responsible for them. This is conceded to be true as to the clothes on the person of the guest, but is denied as

to property otherwise held by him. There is no good reason for the distinction; for the exemption of the innkeeper from liability is based upon the idea that the property is not held as that of a guest, subject to the care of the innkeeper, but upon the responsibility of the guest alone; and, therefore, it makes no difference, in principle, whether it is on his person or otherwise equally under his exclusive control. But this must be an exclusive custody and control of the guest, and must not be held under the supervision and care of the innkeeper, as where the goods are kept in the room assigned to the guest, or other proper depository in the house.

"The public good requires that the property of travelers at hotels should be protected from loss; and, for that reason, innkeepers are held responsible for its safety. To enable the innkeeper to discharge his duty, and to secure the property of the traveler from loss, while in a house ever open to the public, it may, in many instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest, to secure the safety of his property. When such means and requirements are reasonable and proper for that purpose, and they are brought to the knowledge of the guest, with the information that, if not observed by him, the innkeeper will not be responsible, ordinary prudence, the interest of both parties, and public policy, would require of the guest a compliance therewith; and if he should fail to do so, and his goods are lost, solely for that reason, he would justly and properly be chargeable with negligence. To hold otherwise, would subject a party without fault to the payment of damages to a party for loss occasioned by his own negligence, and would be carrying the liability of innkeepers to an unreasonable extent. Story's Bail., secs. 472 and 483; Ashill v. Wright, 6 El. &

Bl. 890; Purvis v. Coleman, 21 N.Y. 111; and Berkshier Woolen Co. v. Proctor, 7 Cush. 417.

"Nor does the rule thus indicated militate against the well established rule in relation to the inability of carriers to limit their liability; for it rests upon the necessity that, under different circumstances of the case, requires the guest to exercise reasonable prudence and care for the safety of his property.

"In connection with the two foregoing propositions, the correctness of the holding of the court below, as stated in the seventh paragraph of the charge, is questioned. Without repeating that paragraph here it is only necessary to say that upon the hypothesis there stated, the guest, by what he did and neglected to do, would directly contribute to the loss of his property. The charge was, therefore, right.

* * *"

The following is an excerpt from *Read v. Amidon,* 41 Vt. 15, 98 Am. Dec. 560, 561:

"The guest is not relieved from all responsibility in respect to his goods on entering an inn; he is bound to use reasonable care and prudence in respect to their safety so as not to expose them to unnecessary danger of loss. Whether the plaintiff was so careless, in laying down his gloves in the manner he did, as to exonerate the innkeeper is a question of fact to be determined by the jury, in view of all the circumstances. What would be regarded as gross carelessness under one set of circumstances might not be so considered under other circumstances; much would depend upon the place, the number of people present, *the kind of property as to its value, and the ease with which it might be removed without detection, etc.*" (emphasis supplied)

Surely, a reasonable and prudent person, with Mrs. Corrigan's knowledge, would not, under the circum-

stances, have behaved as lightly and unconcernedly as she did with an $8,000.00 to $10,000.00 mink coat even if it were insured for $7,000.00, and the fact of insurance certainly does not reduce the standard of conduct required of Mrs. Corrigan with respect to defendant even though negligence was not a defense to her claim against her co-plaintiff insurer. Neither she nor her insurer should be permitted to charge defendant for her neglect.

As indicated above, Mrs. Corrigan was not relieved of all responsibility for her coat. Such is the import of the Arizona statute, supra, and such is the general rule at common law. 43 C.J.S. pp 1155-1156, *Innkeepers,* Sec. 14.

(b) *Answer to Remainder of Appellants' Argument.* Plaintiff's argument under sub-headings 3 to 5 of Argument in their opening brief is answered in one section because, as will appear, none of it is in point. Plaintiffs' argument under their sub-heading 6, concerning custom, has been referred to above and will be further answered in defendant's conclusion.

Plaintiffs first argue that defendant cannot limit its statutory liability by posting in the powder room a notice reading, "Not Responsible For Articles Left Here". *Apparently plaintiffs miss the true import of this notice, which is that Mrs. Corrigan was warned about the impropriety of leaving articles in the powder room and in the face of the warning left her coat there, not only during the dinner but throughout the whole evening, with full knowledge of the danger involved and in the face of the hotel's advice not to do so.*

In support of their argument plaintiffs cite *Maxwell Operating Co. v. Harper,* 138 Tenn. 640, 200 S.W. 515.

This case may be related to plaintiffs' proposition, but clearly has no application here, involving, as it does, a situation where *the guest delivered his coat to an employee of the hotel and received a numbered receipt or check on which the hotel attempted to avoid liability if its employee did not return the coat.* Mrs. Corrigan did not even *tell* any hotel employee what she had done with her valuable coat, much less deliver it to an employee and receive a check. Also, in *Maxwell etc. v. Harper,* supra, the guest was *directed* by the hotel to check his coat.

Plaintiffs next argue that defendant could not limit its statutory liability by an *oral* warning to Mrs. Corrigan that the powder room was an improper place to leave an expensive fur. Once again the point is *not* a limitation of statutory liability but an additional circumstance indicating Mrs. Corrigan was negligent: *she had been warned that the powder room was unsafe but left her coat there any way.*

Plaintiffs differ with the standard of care fixed by defendant's hostess, Mrs. Hicks, in her warning to Mrs. Corrigan regarding the safeguarding of valuable furs; but a reasonably prudent person as a matter of course would adopt this standard.

Plaintiffs then argue that Mrs. Corrigan was under no *duty* to inform defendant that she was leaving her coat in the powder room because the hotel knew that *some* (not all, as plaintiffs imply) guests often did so. In support of this is cited *Swanner v. Conner Hotel Company,* supra, which, as pointed out above, was a case where the guest did with his bag what *the hotel itself* customarily did with it, that is to say, he placed his bag at the bellboy station which he had learned was

the place where the *hotel* placed bags and took care of them while guests were registering.

Defendant might concede that Mrs. Corrigan was under no *duty* to inform defendant that she was leaving her coat in the ladies' room but had she done so it might have indicated some care on her part for the safety of her coat. Of course she had no *duty* to tell defendant if she left her coat on the knob of the front door of the hotel. The fact that on previous occasions she had left her coat in the powder room and had been warned orally and by the sign that it was unsafe to do so can not be utilized by the plaintiffs as evidence that defendant knew the coat was there on the night in question. Defendant was not forced to presume that Mrs. Corrigan would have so little regard for an $8,000.00 coat.

III. *Conclusion.*

In support of their assertion that the conduct required of guests is different in an expensive hotel plaintiffs cite *Burton v. Drake Hotel Company,* 237 Ill. App. 76, a case entirely different from this one. In the *Burton* case the plaintiff, a wealthy man, *delivered his bags to an employee of the hotel and received checks for them.* The bags were lost and were not returned to the guest when he presented his checks. The defendant hotel suggested the guest had been negligent in not disclosing to the employee to whom he delivered his bags that the contents were valued at $2,000.00. The court held that the value was not unusual for the type of guests to which the hotel catered.

Mrs. Corrigan, unfortunately, did not deliver her coat to an employee of defendant for safekeeping, but chose instead to leave it in the ladies' room in the public part of the hotel.

Plaintiffs also cite, on the question of custom, *Keith v. Atkinson,* 48 Colo. 480, 111 Pac. 55. The case is not in point at all. It involved loss of a guest's baggage, the checks for which he gave to a bellboy with instructions to give the checks to the clerk in order that the baggage could be obtained from the railroad by the hotel. Neither the checks nor the baggage were ever recovered by the guest. The court held that if it was the general custom among hotels generally that baggage checks were given to a bellboy, as this guest did, the guest was entitled to recover.

Plaintiffs of course offered no evidence and, so far, have not contended that it is the general custom among hotels, of either the commercial or the resort type, that ladies' $8,000.00 furs are left in the ladies' room in the public part of the hotel.

It is true that some or a few of the guests at the San Marcos on occasions left wraps in the powder room, sometimes in the record called the ladies' room, but as pointed out above this was not the general custom and the hotel notified its guests that the powder room was an unsafe place for wraps.

Plaintiffs seem to obtain comfort from Mrs. Corrigan's testimony that there were approximately 200 coats in the powder room when she and her friend left their coats there. This testimony appears to be clearly erroneous in the light of the physical facts that the powder room is only 15 feet by 20 feet in size (Tr. 50, 95) and the only coat rack in the room is only 84 inches long. (Tr. 37, 95) There obviously could not have been 200 coats in the powder room, and Mrs. Corrigan's approximation is far from correct.

Plaintiffs assert that if Mrs. Corrigan was negligent other people also were negligent. This is not careful thinking and obviously is reasoning in a circle. Also, it does not appear in the record that any other person left an $8,000.00 coat in the powder room for the length of time Mrs. Corrigan did without noticing coats taken out, at the same time possessing Mrs. Corrigan's knowledge, and having so little regard for the safety of her property.

It cannot logically be said, just because Mrs. Corrigan was accustomed to valuable furs and jewelry, and was not too concerned for their safety, and knew they were insured in any event, and because some of the other guests were in the same position and frame of mind, and all were willing to assume an obvious great risk which would appall a reasonably prudent person, that if one was negligent they all were and therefore none of them were negligent.

The type and value of property insured by Mr. and Mrs. Corrigan would indicate that they are people of substantial means, and perhaps a loss of valuable property means less to them than to most of us because, with their resources, it can be replaced easily. If because of this, and also because of the existence of an insurance policy covering the property, they were negligent and their property was thereby lost, that is certainly no basis for imposing liability upon the defendant. On the other hand, Mr. and Mrs. Corrigan, having been negligent and as a result having lost valuable property, are required to stand the loss themselves. They cannot recover from defendant for a loss occasioned by Mrs. Corrigan's negligence. Nor can their paid insurer.

The test to be applied is that of the reasonably prudent man in view of all the circumstances, including the value of the coat, where it was left, Mrs. Corrigan's special knowledge, the warnings given her and all of the other factors. The trial court, whose function it is so to do, considered all of the evidence and found the facts to be that a reasonably prudent man would not have acted as Mrs. Corrigan did, and that the loss would not have occurred if she had exercised ordinary care.

It is respectfully urged that not only was the trial court's finding of negligence *not* clearly erroneous, but that any contrary finding *would* have been erroneous, and that the trial court's finding is correct and should be sustained.

For the reasons above stated, defendant submits that the judgment should be affirmed.

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